No. 68

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

THOMAS R. DAVIS, *Appellant*,

v.

RALPH NEELY AND VIRGINIA GAYLORD NEELY,
Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

JURISDICTIONAL STATEMENT

JOHN W. WILLIS
Counsel for Appellant
1735 De Sales St., N.W.
Washington, D. C. 20036

JOHN M. LUTTRELL
Luttrell, Luttrell, Pendarvis
& Livingston
First National Bank Building
Norman, Oklahoma 73069
Of Counsel

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Oklahoma, entered on July 16, 1963, in consolidated cases Nos. 39402 and 39403 before that court, affirming previous decisions and judgments of the Children's Court of Oklahoma County, Oklahoma, adverse to appellant. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma is reported in 387 P. 2d 494. There was no written opinion of the Children's Court of Oklahoma County. The majority opinion of the Supreme Court of Oklahoma, by Special Justice Shirk, concurred in by five other justices, and the dissent of Hailey, V.C.J., are attached hereto in Appendix A. Blackbird, C.J., and Williams, J., also dissented.

JURISDICTION

This was an adoption proceeding in the State Courts, under the provisions of Title 10, Okla. Statutes 1961, Sections 60.1, et seq. (Uniform Adoption Act).

The judgment of the Supreme Court of Oklahoma on appeal was rendered on July 16, 1963. Appellant filed a first and only petition for rehearing as a matter of right within the time allowed by the Court, and same was denied by order entered on December 17, 1963. Notice of Appeal to the Supreme Court of the United States was filed on March 12, 1964, in the Supreme Court of the State of Oklahoma.

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. § 1257 (2) or, if it be found that this appeal is improvidently taken as to any of the questions here presented, then jurisdiction to decide such questions rests upon 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case, or, in the alternative, to regard and act on these appeal papers as a petition for writ of certiorari as to any questions found to be improvidently

submitted by way of appeal: *Kenny* v. *Supreme Lodge*, 252 U.S. 411; *Truax* v. *Corrigan*, 257 U.S. 312; *Ward* v. *Krinsky*, 259 U.S. 503; *Near* v. *State of Minnesota*, 283 U.S. 697; *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513; *Standard Oil of California* v. *Johnson*, 316 U.S. 481; *Kovacs* v. *Brewer*, 356 U.S. 604; *Hanson* v. *Denckla*, 357 U.S. 235; *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 688; *Ford* v. *Ford*, 371 U.S. 187.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) In an Oklahoma adoption proceeding was not appellant, (the non-consenting natural father) deprived of the protection of due process of law under the United States Constitution, both by lack of fair notice and by a denial of the right to be heard—

(a) where the Uniform Adoption Act, in force in Oklahoma, provided for two separate proceedings, the first to determine the necessity of the father's consent, the second upon the merits of the adoption itself;

(b) and where the notice given to the natural father informed him only of the hearing respecting the necessity of his consent and gave him no notice whatever of a hearing on the merits or of the case he should be prepared to meet;

(c) and where, at the purported hearing on the issue of necessity of consent, substantially all of the evidence relating to the merits of the adoption proceeding was received, despite the adoption court's express acknowledgment that the only issue before it was the necessity of the father's consent;

(d) and where, at the close of this hearing, the adoption court made its order that the father's consent

was not necessary by reason of its judgment then and there rendered depriving him of all parental rights of custody or visitation, outside and beyond the scope of the pleadings, and outside and beyond the scope of hearing and notice given appellant thereof, and thereupon barred him from any participation in the purported hearing on the merits, conducted immediately thereafter in a pro forma manner;

(e) and where the Oklahoma Supreme Court expressly acknowledges that the natural father had a right to be heard at the hearing on the merits of the adoption petition, but excuses the error on the ground that the father had made no "offer of proof".

(2) Was not appellant also denied the protection of procedural due process of law under the United States Constitution as a result of the construction placed upon the Uniform Adoption Act by the Oklahoma Supreme Court, to the effect that the judicial determination of the lower court depriving the father of all custody and visitation rights (and thus eliminating the necessity for his consent to the adoption) could be made de novo on the spot, by the adoption court, rather than in a separate and prior proceeding, where the pleadings filed in the adoption court by appellees alleged only, in respect to the issue of consent, that appellant's consent was unnecessary by reason of *prior* judicial deprivation of all custody and visitation rights, and prayed that the adoption court so find and hold, said pleadings being completely devoid of any allegation that appellant should be so judicially deprived by the adoption court itself, and no prayer for any such relief being contained therein, when said construction had the effect of rendering the notice given to appellant

wholly insufficient to inform him of the issues to be tried, or of the case he should prepare to meet.

(3) If the questions above set forth be answered adversely to appellant, then appellant asks that the Court reach the question expressly reserved in *Kovacs v. Brewer*, 356 U.S. 604, 78 Sup. Ct. 963, 2 L. Ed. 2d 1008, and *Ford v. Ford*, 371 U.S. 187, 83 Sup. Ct. 273, 9 L. Ed. 2d 240, to-wit: Where a California custody decree would be held to be res adjudicata in that state in the absence of a change of circumstances or of a showing of a special set of facts justifying the suspension of that rule, must not California's sister state of Oklahoma accord full faith and credit to the California decree, under the requirements of the United States Constitution.

STATUTES INVOLVED

Prior to the commencement of the adoption proceeding in the lower court Oklahoma had adopted the Uniform Adoption Act, same being found in Title 10, Oklahoma Statutes 1961, Sections 60.1 to 60.23, inclusive. Those sections which were particularly pertinent in the proceedings below, and which require consideration here, are as follows:

> "Section 60.6. Consent of Parents. A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of cruelty, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child by any court of competent jurisdiction on account of cruelty or neglect."

"Section 60.7. Adoption Without Consent of Parents. Where a parent has been adjudged guilty of cruelty or extreme curelty or gross neglect of duty and divorced or judicially deprived of the custody of a child on account of such cruelty or extreme cruelty or gross neglect of duty, or where a parent has willfully failed, refused or neglected to contribute to the support of his child, as provided in the decree of divorce, for a period of one (1) year next preceding the filing of a petition for adoption of such child, it shall not be necessary to procure the consent of such parent to the adoption of said child."

"Section 60.8. Application for Adoption Without Consent of Parent. Before the court hears a petition for adoption without the consent of a parent, as provided in Section 7 of this Act, the consenting parent, legal guardian or person having legal custody of the child to be adopted shall file an application setting out the reason that the consent of the other parent is not necessary, which application must be heard and an order entered thereon in which said child is determined to be eligible for adoption as set out in Section 7 hereof. Said application shall be set for hearing on a day certain and a notice of such application shall be given the parent whose consent is alleged to be unnecessary. The notice of the application shall contain the name of the child, or children, for whom application for adoption is made and the date said application is set for hearing and the reason that said child is eligible for adoption without the consent of such parent, and shall be served upon such parent as summons in civil cases at least ten (10) days prior to the hearing. Provided, that if such parent resides outside of the county, such notice shall be given by registered mail at least fifteen (15) days prior to the hearing. Provided, that if the whereabouts of such parent is not known, and this fact be sworn to by the

> affidavit of the consenting parent, legal guardian or person having legal custody of the child, notice by publication shall be given by publishing notice one (1) time in the newspaper having a general circulation in the county and qualified as a newspaper under the laws relating generally to service of notice by publication, which publication shall be at least fifteen (15) days prior to the date of the hearing." (Laws of 1957, p. 23).

Both the trial court and the Supreme Court of Oklahoma based their judgments upon certain statutory provisions contained in the "Children's Court Act," enacted in 1957, which Act, by reason of population brackets set forth therein, applies to only one county in the state, Oklahoma County. It was under this Act that the trial court was constituted. This special court Act is found in Title 20, Oklahoma Statutes 1961, Section 861 to 907, inclusive. Section 863 provides in pertinent part as follows:

> "Section 863. Original Jurisdiction. Except as otherwise provided herein, the court shall have original jurisdiction in proceedings: . . . 4. To determine custody of the person only of any child living within the county. 5. For the adoption of a minor. . . ."

STATEMENT

Appellant, Thomas R. Davis, is the natural father of two minor children, Paul Delmar Davis and Gaylord Davis, which children are sought to be adopted without his consent and over his objection by Ralph Neely and Virginia Gaylord Neely, appellees. Mrs. Neely was formerly the wife of appellant. She is the natural mother of the children and Ralph Neely is her second husband.

The adoption proceedings were originally commenced and tried in the Children's Court of Oklahoma County, Oklahoma. At the conclusion of the proceedings appellant took two separate appeals to the Supreme Court of Oklahoma, docketed as Nos. 39402 and 39403 in said Appellate Court. Case No. 39402 was an appeal from the order of the trial court holding the children to be eligible for adoption without his consent. Case No. 39403 was an appeal from the adoption decree entered immediately thereafter in the same proceeding by the trial judge. The Supreme Court of Oklahoma consolidatd said appeals and decided them adversely to appellant at one time and in one opinion.

Appellant and his said former wife were divorced in California in 1949 by an interlocutory decree, and the final decree was entered in 1950.

Under the terms of an agreement made by the parties, and also under said interlocutory decree and final decree of divorce, the parties were given joint custody of the two children, with their mother to have the physical care, custody and control of said children, but subject to the right of appellant to visit them at all reasonable times and places, and with their mother to be responsible for their support. She had ample trust fund income for taking care of the children, and appellant was unable to do so at that time (R. 52-53).

In 1950 the mother of the children married Ralph Neely in California. They moved to Oklahoma City, Oklahoma, with the children, and appellees and the children have been within the State of Oklahoma since that date.

In late 1954 appellant, in an attempt to enforce the visitation rights given to him by the California Court,

but denied him by the mother of said children, filed a petition for a writ of habeas corpus in the District Court of Oklahoma County, Oklahoma. The writ was denied on February 19, 1955.

In 1957 appellant sought and obtained, in California, in the court where the divorce was granted, an order awarding him the physical care, custody and control of the children in July of each year, commencing in 1958, in addition to his rights of reasonable visitation, Mrs. Neely participated in this proceeding through California counsel.

From the modification order rendered in the divorce court Mrs. Neely took an appeal and the parties appeared in the District Court of Appeal of the State of California, First Appellate District, Division Two, by counsel and filed briefs therein. On January 11, 1960 the modification order of the divorce court was affirmed by the Appellate Court. The opinion of the Appellate Court is found in *Davis* v. *Davis*, 177 Cal. App. 2d 75, 1 Cal. Rptr. 923. The California modification order had become final in all respects prior to the trial of the adoption case in Oklahoma.

The adoption proceeding giving rise to this appeal was commenced in the Children's Court of Oklahoma County on October 15, 1959, when appellees filed their petition for adoption and their application for an order determining said children to be eligible for adoption without appellant's consent.

In their original petition and application to dispense with appellant's consent, appellees took the position that consent was unnecessary due to the fact that the California divorce was awarded to the mother on the

grounds of cruelty. However, the Oklahoma courts had previously held that, in order to dispense with consent, the offending parent must, at the time of the adoption, have no right to custody or visitation. *Ronck* v. *Ronck*, 203 Okl. 121, 218 P. 2d 902; *Application of Lear*, 287 P. 2d 447; *Fisher* v. *Wilson*, 328 P. 2d 420.

Apparently recognizing this defect and attempting to correct same, appellees thereafter filed an amendment to said petition and application, setting out the unsuccessful habeas corpus action filed by appellant as a purported judicial deprivation of custody and visitation rights which he had under the original California decree.

In pleadings filed by him in the adoption court, appellant addressed himself to the matters raised by appellees, and the notice previously given to him. He contended at all times that he had custody and visitation rights vested in him by valid California decrees, that such California decrees were entitled to full faith and credit in Oklahoma under the provisions of the U. S. Constitution and that the adoption could not proceed without his consent so long as he held such custody and visitation rights.

Under the language of the Uniform Adoption Act, and under the interpretation given to it by the National Conference of Commissioners on Uniform State Laws, it is contemplated that in an adoption proceeding where consent is not given the court should proceed first to consider the issue of the necessity of such consent, and once that has been decided, if consent be found unnecessary, then proceed to a hearing on the merits of the adoption. (40 Iowa Law Review 329).

In spite of the state of the pleadings, the nature of the notice given to appellant, and the provisions of the Uniform Adoption Act, when the matter came on for trial upon the issue of necessity of his consent, the trial court proceeded, over appellant's strenuous and continuing objections, to hear testimony which was entirely irrelevant to a determination as to whether appellant had theretofore been judicially deprived of all custody and visitation rights. The testimony received consisted largely of expert testimony by doctors and others to the effect that the adoption would be a good thing for the children.

After the hearing on the necessity of consent had been completed the case was recessed to allow the parties time to present suggested findings of fact and conclusions of law, and with the understanding that when the court reconvened on May 27, 1960, a decision would then be rendered on the necessity of appellant's consent. That this was the definite understanding of the court and appellant is shown by those portions of the record set out verbatim in the strenuous dissent filed by Halley, V.C.J., in the Oklahoma Supreme Court.

Nevertheless, when court reconvened, and after the trial judge ruled against appellant on the consent question, he immediately ordered the hearing to proceed on the merits of the adoption and ruled that appellant was not entitled to take part therein. The trial judge ignored a request by appellant that the matter be recessed in order to allow appellant to apply to the Oklahoma Supreme Court for a writ of prohibition. Appellant was not then prepared to submit any evidence on the merits of the adoption, since he had no notice that a hearing on that matter would be conducted

on that date, and consequently presented no offer of proof. When the question of appellant's right to participate was presented to the Oklahoma Supreme Court it was disposed of by a ruling that, although he had the right to take part in the hearing on the merits, he had waived it by failing to offer any proof when the matter came on for hearing without notice to him.

The trial court, and later the Oklahoma Supreme Court, both held that, due to the special statutory provision applying only to this particular adoption court, appellant could, in a hearing directed toward the necessity for his consent, then and there be deprived of all custody and visitation rights respecting the children, regardless of lack of prior notice regarding the trial of such an issue.

In the pleadings filed by appellees, and in the notice given to the appellant, there was no suggestion that the trial court was conceived to have the power to deprive appellant of all parental rights in this proceeding. Instead, everything was pitched toward the proposition that appellant had previously been deprived of all parental rights, thus eliminating the necessity of his consent to the adoption. Although the trial court persisted in admitting evidence which was irrelevant on the issue framed by the pleadings, and although repeatedly pressed by trial counsel for appellant to explain his theory concerning the reception of such inadmissible testimony, the trial judge did not, until the very end of the proceeding, reveal his view that he could, on the basis of such testimony, then and there deprive appellant of all of his rights respecting the children. The suggestion was not made by appellees in any form until the filing of their suggested findings of fact and conclusions of law (R. 293).

There was never any suggestion by appellees that there had been any change of circumstances since the entry of the California modification decree, nor did they suggest any exceptional circumstances which would justify the suspension of the ordinary rule that the California decree was res adjudicata in that state in the absence of such a change in circumstances. Even in the suggested findings of fact and conclusions of law filed in the trial court by appellees, they made no contention or suggestion that there had been any such change of circumstances or other exceptional facts which would make the full faith and credit clause of the U. S. Constitution inapplicable to the California modification order.

FEDERAL QUESTIONS WERE PROPERLY RAISED

The federal questions presented here were raised by appellant in the trial court and in the Supreme Court of Oklahoma at the time, in the manner, and with results as set forth below:

1. Application of the Full Faith and Credit Clause of the U. S. Constitution to this case:

A. In the trial court—

(1) In appellant's amended answer, (paragraph 8), appellant alleged that the modification order and judgment entered in the State of California and affirmed on appeal was entitled to recognition and full faith and credit in the State of Oklahoma. (R. 26).

(2) In appellant's suggested conclusions of law, the trial court was urged to find that the California modification order was valid and binding in California and, therefore, entitled to full faith and credit in Oklahoma. (R. 305).

(3) In the order determining the children eligible for adoption without appellant's consent, the trial court found that the California modification order affirmed on appeal, was not entitled to full faith and credit in said trial court. (R. 340).

B. In the Oklahoma Supreme Court—

(1) In appellant's brief in Case No. 39402 in the Oklahoma Supreme Court (R. 373) at page 41, et seq., appellant urged that the judgment of the California Court was binding upon the parties and that under the Constitution of the United States the courts of the State of Oklahoma were required to give full faith and credit to the same. Likewise, at pages 44 and 58 appellant urged the applicability of the full faith and credit clause of the U. S. Constitution, as requiring Oklahoma to honor the California modification order giving to appellant enlarged custody and visitation rights, said California decree having been affirmed on appeal prior to the adoption hearing.

(2) In appellant's reply brief in Case No. 39402 in the Supreme Court of Oklahoma (R. 375), at page 12, appellant again urged the requirement that full faith and credit be given to the judgment of the State of California under the Constitution of the United States.

(3) In appellant's petition for rehearing (R. 427), appellant devoted eight pages to argument and citation of authorities bearing upon the application of the Full Faith and Credit Clause of the U. S. Constitution to this case, and urging that, since no change in circumstances was proved after the entry of the California decree, said California decree was binding upon the courts of Oklahoma, so far as appellant's rights to

custody and visitation were concerned, thus making it impossible to proceed with the adoption without his consent.

(4) The Oklahoma Supreme Court did not pass upon the applicability of the Full Faith and Credit Clause, but based its affirmance upon a ruling that the trial court had the power, in and of itself, to deprive appellant of all custody and visitation rights, and thus dispense with his consent to the adoption, even though no such issue had been framed nor any notice of such a hearing given to appellant.

2. Deprivation of Appellant's Rights to Procedural Due Process Under the Fourteenth Amendment to the U. S. Constitution:

A. In the trial court--

(1) When the court ordered the adoption hearing to proceed on the merits on May 27, 1960, although such a hearing had not been set for that date, counsel for appellant objected in the following language. (R. 321-322):

> MR. LUTTRELL: "If the court please, if the court should go ahead right now on the petition for adoption it would become entirely an ex parte proceeding. The court would necessarily hold that the father has no right to be heard or to take part in such proceeding. We specifically had an understanding when we left this courtroom before that the only thing we were coming back here for on May 27th was the question of eligibility of these children for adoption, and the transcript of testimony will so show, and if the court takes the view that we just don't have any more rights at all, that's one thing; but if the court thinks we

have any rights they would be violated by proceeding further at this time. . . ."

(2) Although not specifically couched in terms of due process, appellant made numerous and strenuous objections in the trial court to the introduction of any evidence on the necessity of consent, other than records of previous judicial proceedings. Despite his objections, the trial court persisted in receiving the opinion testimony of various witnesses. It was impossible for appellant to ascertain, although he attempted repeatedly to do so, what the trial judge had in mind in hearing such evidence. It was not until all the evidence had been received that the trial judge finally revealed that he believed he had the power to order the children adoptd without the consent of their father, though the evidence did not show that the father had theretofore been judicially deprived of all custody rights. (R. 278-279).

(3) When the trial judge, at the time he rendered judgment against appellant on the consent issue, finally revealed that he had been conducting a custody hearing all the time, designed to enable him to divest appellant of all parental rights, and that he considered his court to have that power under 20 O.S. 1961, § 863, trial counsel for appellant immediately and pointedly objected in language as follows (R. 325-6):

MR. LUTTRELL: "Section 863 of Title 20 has not been cited in this proceeding in any brief, until yesterday I received a copy of the proposed findings of fact and conclusions of law of the Petitioner and found that they were asking the court to rely on Section 863 of Title 20, apparently as a ground for depriving this father of custody or any privilege of visitation of these children if he had not already been so deprived by previous

orders of other courts. Now, that is the first hint that we have had that this court was being asked to undertake a proceeding relating to the custody of these children. A petition for adoption was filed here in which it was alleged, or perhaps in the amendment thereto, or in the accompanying—that this father had already been deprived of custody. There was nothing in the application that asked this court to deprive the father of custody. That issue was never raised in this court; we were never given any notice that we should come forth with evidence on that issue, so in my mind the court's order can't be based on 867. Furthermore, the statute provides that in adoption matters the procedure set out for County Courts is applicable. There hasn't been any question in the County Court that that court had authority to deprive a parent of custody who had not been previously deprived of such custody. I think the statute specifically provides—again, we just feel that if the court should go ahead at this time, as Your Honor has intimated, he feels, that the order already entered deprives the father of all rights, and we don't think the law contemplates such a thing."

B. In the Oklahoma Supreme Court—

(1) In appellant's brief in Case No. 39402 (R. 373) at pages 45, 48, and 49, and in his brief in Case No. 39403 (R. 383), at pages 14 and 15, appellant urged that notice and an opportunity to be heard are essential elements of due process of law; that a hearing had been conducted by the trial court on an issue which was not framed or raised by the pleadings in any way; that a hearing had been held in the trial court without adequate notice to him; that he had been deprived of the right to be heard on the merits of the adoption; and that there was unconstitutional absence of due process.

(2) In appellant's reply brief in Case No. 39402 (R. 375), at page 15, appellant urged the Oklahoma Supreme Court that he had been deprived of valuable rights without due process of law by reason of the trial court having conducted a hearing on an issue outside the pleadings and the notice theretofore given him. The issue thus tried over appellant's objection was whether the Children's Court, in that proceeding, should deprive appellant of all parental rights, regardless of what had transpired before and in other courts, and then order the children adoptable without his consent.

(3) In appellant's petition for rehearing addressed to the Oklahoma Supreme Court more than ten pages were devoted to the proposition that appellant had been deprived of procedural due process of law under the U. S. Constitution by reason of the interpretation placed upon the Uniform Adoption Act, and by reason of the refusal of the trial court to permit appellant to participate in the hearing on the merits of the petition for adoption.

THE QUESTIONS ARE SUBSTANTIAL

I

Oklahoma has deprived appellant of valuable rights protected by the United States Constitution, without due process of law, in violation of the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant is a citizen of the United States and of the State of California. The effect of the trial court decision and the majority opinion of the Supreme Court of Oklahoma is to deprive appellant of valuable parental rights without due process of law. This court has stated that parental rights are far more precious than property rights and are entitled to the protection of the due process clause. *May* v. *Anderson*, 345 U.S. 528.

Due process in any proceeding which is to be accorded finality requires that there be notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, and the notice must be of such nature that it reasonably conveys the required information. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

Under any reasonable interpretation given to the Uniform Adoption Act and in accordance with the interpretation thereof by the drafters of such act, the trial court should first have held and conducted a hearing to determine only whether or not appellant had *theretofore* been deprived of all parental rights and custody, so that under applicable Oklahoma decisions, supra, the adoption could proceed without his consent. Indeed, this was the only issue framed by the pleadings and the only issue as to which any notice was given.

The majority opinion of the Oklahoma Supreme Court concedes this to be the case in the following language:

> "* * * We are not unmindful that to this point in the proceedings all of the parties were looking solely to the effect of the divorce decree of the California court and the habeas corpus judgment of the Oklahoma court. However, at the opening of the proceedings, and at least two times during the hearings, the trial court indicated that its power to determine custody of minors was at issue and should be considered, and that the Children's Court would have the authority to determine that the children were eligible for adoption without the consent of the natural father 'regardless of whether or not Mr. Davis has been heretofore judicially deprived of his rights.'"

This statement by the majority of the Oklahoma Supreme Court was made even though the record shows that appellant continuously and vigorously objected to the trial court receiving any evidence which would have any bearing on the merits of the adoption, or on any issue other than previous judicial orders affecting the parties and their respective rights *vis a vis* the children. As a matter of fact, as pointed out above, it was not until all the evidence had been received, most of it over appellant's objection, that the trial judge finally admitted what he had in mind.

If the procedure set forth in the Uniform Adoption Act is followed, as intended by the framers thereof, and as the same is accepted and urged by the dissenting opinion below, then there will be no danger to due process. If the hearing on the issue of necessity of consent is limited to the question of whether or not the offending parent has *theretofore* been deprived of

all rights, and if the proper notice is given, then there will be no danger of deprivation of these rights.

However, the Oklahoma Supreme Court, ruling that the particular trial court here has powers which adoption courts do not ordinarily have, *and that such powers may be invoked and exercised without notice,* has so interpreted the Uniform Adoption Act that due process has been violated.

This Court has previously held that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, a statute must be tested by its operation and effect. *Near* v. *State of Minnesota,* 283 U.S. 697. The operation and effect of the Oklahoma Statute as applied to appellant is clearly unconstitutional.

Where the validity of a state statute as construed by the courts of that state is drawn in question on the ground of its being repugnant to the Federal Constitution, a judgment of the Supreme Court of that state in respect to the question properly comes before the United States Supreme Court on appeal under the federal procedural statute. *Standard Oil Co. of Calif.* v. *Johnson,* 316 U.S. 41.

This Court is bound by the construction of a state statute adopted by a state court of last resort, but it is not concluded by the reasoning of that court and must exercise its individual judgment when called on to determine the federal question whether the act, as construed and applied, is repugnant to the restrictions of the Fourteenth Amendment. *Ward and Gow* v. *Krinsky,* 259 U.S. 503.

Under the majority opinion of the Oklahoma Supreme Court here appealed from, appellant was deprived of valuable parental rights of custody and visitation in a hearing of which he had no notice and for which he had no opportunity to prepare, all in violation of the guarantee of the due process clause of the Fourteenth Amendment, and in addition, appellant was denied the right to participate in the adoption hearing on the merits by the trial court. The Supreme Court of Oklahoma, while finding that he did have a right to participate in such hearing on the merits, effectively destroyed this right by saying that, even though appellant had no notice of the time and place of such hearing, unless he made an offer of proof he had waived any right to complain. The fallacy of this line of reasoning is amply demonstrated in the vigorous dissent of Halley, V.C.J.

In *Truax* v. *Corrigan*, supra, this Court stated that the due process and equal protection clauses of the Fourteenth Amendment are very close and it is customary to consider them together. Here the Oklahoma Supreme Court has reached a result adverse to appellant solely on the basis of a special power found in the Children's Court of Oklahoma County, not found in other courts having adoption jurisdiction in Oklahoma, so that appellant has been denied equal protection of the laws of Oklahoma. In other words, the result reached by Oklahoma here is different than if the adoption proceeding had been conducted in another county or even in another court having adoption jurisdiction in the *same* county.

II

Oklahoma has failed and refused to give full faith and credit to the judgment of a sister state, in violation of the U. S. Constitution.

Article IV, Section 1, of the U.S. Constitution declares:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

By statute Congress has provided that judgments "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. Section 1738.

At the time the adoption hearing was held in Oklahoma, the most recent decision fixing the custody and visitation rights of appellant was the California modification order rendered in 1958 in the court where the divorce was granted, and later affirmed on appeal, which enlarged the parental rights of appellant. *Davis* v. *Davis,* 177 Cal. App. 2d 75, 1 Cal. Rptr. 923.

The decision of California court explicitly and unmistakably negated any possibility of adoption without consent under Oklahoma law, because it left to appellant, or even enlarged, his parental rights of custody and visitation. *Ronck* v. *Ronck,* 203 Okl. 121, 218 P.2d 902.

This Court has previously had occasion to consider, on several occasions, the applicability of the full faith and credit clause to child custody decrees. In *Ford* v.

Ford, 371 U.S. 187, this Court held that South Carolina was not bound to recognize a Virginia decree respecting custody, since the Virginia decree was only a dismissal, the result of an agreement between the parties equivalent to a compromise intended to settle a cause of action. The Virginia court had held no hearings as to the custody of the children. Thus, the question raised here was not reached.

In *Kovacs* v. *Brewer,* 356 U.S. 607, this Court again explicitly reserved an expression of opinion as to the binding effect of a child custody decree in the absence of a change in circumstances, finding that North Carolina may have denied recognition to a New York decree on the ground of a change of conditions, and remanding the case to North Carolina for clarification of that point. It was expressly stated that the issue of changed circumstances had been raised in the pleadings and considerable evidence had been introduced on that issue.

In Kovacs and other cases this Court has said that the state of the forum has as much leeway to disregard the judgment, to qualify it, or to depart from it as the state where it was rendered, where the applicability of the full faith and credit clause to a custody decree is concerned.

It is the rule in California, as in other states, that a custody decree is res adjudicata in the absence of a showing of a change in circumstances after it was rendered. *Goto* v. *Goto,* 52 Cal. 2d 118, 338 P.2d 450. Although California has also said that this rule may not be "ironclad," and that it may change the custody of a child in some exceptional circumstances where it finds the child's welfare requires it, even though there has been no apparent change of circumstances, such

reserved right would find application rarely, if ever. As was said by the California Supreme Court in *Foster* v. *Foster,* 8 Cal. 2d 719, 68 P.2d 719, 723: "However, such a case would be a most unusual one. It is more speculative than real. . . ."

There was no allegation made by appellees in the adoption proceeding that there had been any change of circumstances since the entry of the modification order in the California court, nor was there any allegation of any unusual situation that would require appellant to be deprived of custody rights even though circumstances had not changed.

Thus, the full faith and credit question reserved in Ford and Kovacs is squarely posed here. Unlike Ford, here the California court had all the parties before it and rendered a judgment after consideration of all pertinent evidence offered by them. Far from being an agreed decree, as was the case with the Virginia judgment in Ford, the California decree here was the result of extended litigation between the parties.

Opposite from Kovacs, in the instant case there was no allegation of any change of circumstances since the entry of the California decree and it is obvious that the Oklahoma courts did not base their conclusion on any such theory. The trial court simply held the California decree null and void and the Oklahoma Supreme Court refused to rule upon the question.

Without violating due process, the Children's Court of Oklahoma County could not proceed to hear any evidence relating to any change of circumstances, or any other exceptional situation requiring a change in custody, since no such issue had ever been framed by

the pleadings, nor was any notice of any hearing on any such issue given to appellant. Under the requirements of due process as above urged, the trial court was thus foreclosed from consideration of anything other than the legal effect of the California modification decree as rendered and affirmed on appeal. In refusing to recognize it, the trial court violated the full faith and credit clause of the U.S. Constitution and the effect of the opinion of the Oklahoma Supreme Court is to ratify and approve such denial.

Appellees have sought to avoid the effect of the California decree by adopting the pose that they did not participate in the second California proceeding. However, this refuge is not open to them. Mrs. Neely cannot claim that a default took place as in *Halvey* v. *Halvey,* 330 U.S. 610, simply because she was not disposed to make the trip to California. She appeared by her attorney, who introduced documentary evidence, engaged in lengthy cross examination, and in every respect fully participated in the hearing. Mrs. Neely was thus fully represented, fully participated through counsel, and waived any objection to jurisdiction which she might otherwise have advanced. In any event the continuing jurisdiction of the court awarding custody of children in a divorce action is as much settled in California as it is in Oklahoma; *Tinker* v. *Tinker,* 144 Okl. 97, 290 P. 185; *Davis* v. *Davis,* supra.

CONCLUSION

It is earnestly submitted that the judgment of the Supreme Court of Oklahoma, affirming a similar judgment of the trial court, has placed such a construction upon the notice and procedural provisions of the Uni-

form Adoption Act that appellant has been deprived of his valuable, even precious, parental rights without due process of law required by the Fourteenth Amendment to the U.S. Constitution. Other citizens, if they happen in the future to find themselves similarly situated in adoption proceedings in the Children's Court of Oklahoma County, Oklahoma, although not in other courts of that State, may likewise be deprived of federally guaranteed rights.

In addition, the Oklahoma courts have failed and refused to give full faith and credit to the judgment of a sister state, California, when, in the absence of any change of circumstances or other special facts, that judgment would have been res adjudicata between the parties in California, and no such change of circumstances or other special facts were pleaded or proved in the instant proceeding.

We urge that the questions presented by this appeal are substantial and of public importance, and that they require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

JOHN W. WILLIS
Counsel for Appellant
1735 De Sales St., N.W.
Washington, D. C. 20036

JOHN M. LUTTRELL
Luttrell, Luttrell, Pendarvis
& Livingston
First National Bank Building
Norman, Oklahoma 73069
Of Counsel

APPENDIX A

Opinions and Judgment Below

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 39,402, No. 39,403

THOMAS R. DAVIS, *Plaintiff in Error*,

v.

RALPH NEELY and VIRGINIA G. NEELY, *Defendants in Error*.

SYLLABUS

1. The doctrine of "parens patriae" is the inherent power and authority of the people of a State acting through the Legislature to provide protection of the person and property of persons non sui juris.

2. Determination by Children's Court that child is eligible for adoption without consent of natural parent is not an order subject to appeal, but review of such determination is properly before this Court upon appeal of Decree of Adoption. Title 10, 1961, § 60.19.

3. Where divorce decree awards custody of child to one parent, other parent can be found to have neglected to provide proper care and maintenance for the child within meaning of statute authorizing adoption of child without consent of such other parent. Title 10 O.S. 1961, § 60.7; Title 20 O.S. 1961, § 863.

4. Whether there have been such desertion and neglect of child sought to be adopted as to obviate obtaining consent of parent is question of fact for the Children's Court. Title 20 O.S. 1961, § 863.

TWO APPEALS FROM CHILDREN'S COURT OF OKLAHOMA COUNTY, OKLAHOMA

Hon. Homer Smith, Judge

Petitioner filed petition for adoption of two minor children to which adoption the natural mother (petitioner's

wife) consents. Petitioner also filed application for order determining children eligible for adoption without consent of the natural father, which order was entered by the Children's Court. Thereafter, that Court entered Decree of Adoption.

AFFIRMED

LUTTRELL & LUTTRELL,
Norman, Oklahoma

ROBERT T. RICE
Edmond, Oklahoma
For Plaintiff in Error,

LOONEY, WATTS, LOONEY, NICHOLS & JOHNSON

NED LOONEY, ANNA B. OTTER,
Oklahoma City, Oklahoma
For Defendants in Error.

SHIRK, Special Justice:

Two cases concerning the proceedings for the adoption of two minor children without the consent of the natural father are pending before this Court. Cause No. 39,402, relates to the judgment of the Children's Court which determined the children eligible for adoption without the consent of their natural father and Cause No. 39,403, concerns the Decree of Adoption. These two cases have been consolidated by this Court because of the reasons hereinafter set forth.

The natural parents of the two minor children are Thomas R. Davis and Virginia G. Neely. They were married in 1945 and were divorced in the Superior Court of Marin County, California, in 1950. Care, custody and control of the minors was granted to the mother and the father was given the right to visit the children under reasonable circumstances.

The mother subsequently married Ralph Neely, hereinafter referred to as the petitioner, and established her home in Oklahoma. Since the date of the marriage the two minors have lived with their mother and her husband in the Neely home in Oklahoma County.

Although at no time since the divorce has the natural father contributed to the support and maintenance of the children, he has maintained an irregular but not indifferent communication with the children by letters and by gifts as Christmas and on birthdays. In 1954 he came to Oklahoma for the purpose of visiting the children but was unable to do so. In 1955 he instituted a habeas corpus proceeding in the District Court of Oklahoma County in order to require Mr. and Mrs. Neely to allow him to see his children. The application for a writ of habeas corpus was denied on February 19, 1955. Although no formal journal entry was entered by the Judge who heard the case, his remarks from the bench at the conclusion of the hearing denying the writ were transcribed and are a part of the record in this cause. The journal entry denying writ of habeas corpus was entered sometime later by the successor to the Judge.

In 1957 the natural father filed a motion in the original divorce action in the Superior Court of Marin County, California, for modification of the custody rights. An order was entered on May 8, 1958, awarding custody to the father for the month of July each year beginning in 1958. An appeal from this modification was taken by Mrs. Neely to the District Court of Appeal, First District, and the order was affirmed on January 11, 1960. See Davis v. Davis, 177 Cal. App. 2d 75, 1 Cal. Rptr. 923.

While the appeal from the modification order was pending, the petitioner and Mrs. Neely filed on October 15, 1959, in the Children's Court of Oklahoma County, Oklahoma, petition for the adoption of the two children. The natural mother gave her consent. At the same time the petitioner

filed an application to declare the minors eligible for adoption without consent of the father. Notice required by the Uniform Adoption Act, (Title 10 O.S. 1961, Chapter 2 A) was given to the natural father.

Hearing on the merits commenced on April 15, 1960. Considerable oral testimony was adduced, and copies of a number of letters the natural father had written from time to time to his children and other correspondence were offered in evidence. At the conclusion of the hearing the matter was taken under advisement by the trial court and requested findings of fact and conclusions of law were submitted.

On May 27, 1960, the Children's Court entered its findings of fact and conclusions of law and entered its order declaring the minors eligible for adoption without the consent of the natural father. On the same date there was filed the consent of adoption by both minors and the decree of adoption was entered. The natural father filed motions for new trials from the order relating to the consent issue and also from the decree of adoption. Both of these motions were overruled and the natural father perfected the two appeals.

One of the issues involved in both cases is that of appellate procedure. The natural father contends that the order determining the children eligible for adoption without his consent was a final order, and being a final order the same could be appealed; that he gave the statutory notice of appeal and that the same was pending when the trial court proceeded to hear and determine the petition of adoption; and that the trial court was without jurisdiction to proceed to hear and determine the petition for adoption until the appeal from the order determining the children eligible for adoption without the consent, had been finally determined. In other words, the natural father proposes that there are two separate and distinct phases in an adoption proceeding where the issue of consent is in-

volved, i.e., the issue of consent and whether a decree of adoption should be decreed; that both are final orders and as such, both are appealable; that if an appeal is lodged from an order determining a child is eligible for adoption without the consent of its natural parent, the court does not have jurisdiction to proceed with the adoption phase until the appeal from the order determining that consent is not necessary, is finally determined.

Although Title 10 O.S. 1961 § 60.8, provides that before the court hears a petition for adoption without the consent of a parent an order must be entered determining that consent is not necessary, we do not believe that such order standing alone, prior to the completion of the adoption proceedings, comes within the purview of Title 10 O.S. 1961 § 60.19, which provides:

> "An appeal may be taken from any final order, judgment or decree rendered hereunder to the Supreme Court by any person aggrieved thereby, in the manner provided for appeals from said court in civil matters."

Whether a natural parent executes a written consent of adoption or whether application is made for adoption without the consent of a parent, both are part and parcel of an adoption proceeding. If the trial court determines that consent of a parent is not necessary and a decree of adoption is entered, the parent may then appeal and have considered on appeal the issue concerning consent and the issue concerning the decree of adoption. If an order determining a child is eligible for adoption without consent of a parent could be appealed the proceedings for the adoption would have to be held in abeyance until the question of consent was determined by this Court on appeal. This would delay the final adoption proceedings and would not be in harmony with Lewis v. Lewis, Okl., 380 P.2d 697, wherein we said:

> "• • • it seems reasonable that the Legislature in providing for appeals direct to this court was not un-

mindful of the desirability of a speedy and final determination of the adoption proceeding in the interest of the children involved."

We conclude that where an application is made for adoption without the consent of a parent, if the trial court determines the child to be eligible for adoption without the consent of the parent, the order making such determination is not an appealable order as the aggrieved person may present such issue on appeal if and when a decree of adoption is entered and a proper appeal is perfected from the decree of adoption. However, if the trial court determines that a child is not eligible for adoption without the consent of a parent, the order making such determination is appealable as the aggrieved party could not proceed further in the adoption proceeding.

We therefore hold that the Children's Court did not err in proceeding with the adoption, even though the natural father had saved his exceptions and given notice of appeal from the order determining the children eligible for adoption without his consent. This is grounded on the conclusion that an appeal does not lie from an order of the Children's Court determining a child eligible for adoption without the consent of its natural parent.

However, since this is a question of first impression before this Court and the statutory provisions are not too definite on this issue and the natural father properly perfected an appeal from the Decree of Adoption, which would include the issue as to consent, we can only conclude that the issue as to consent is properly before this Court for determination. Therefore, Cause No. 39,402, which relates to the consent issue is consolidated with Cause No. 39,403, which relates to the Decree of Adoption.

In determining that the children were eligible for adoption without consent of the natural father, the trial court found, inter alia, that the habeas corpus proceeding in the

District Court of Oklahoma County, Oklahoma, divested the natural father of all remaining rights he had of the custody and visitation of the children; and further found that the Modification of the Divorce Decree entered by the California Court, after the habeas corpus proceeding in the Oklahoma District Court, was null and void and beyond the jurisdiction of the California Court in the absence of domicile or presence of the minor children. However, it is not necessary to consider the correctness of the above findings and conclusions of law when we consider the other findings and conclusions of law in the trial court's order in connection with the statutory power and authority of the Children's Court and our adoption laws.

Under the doctrine of parens patriae, Oklahoma has the inherent power to enact statutes, be the same adoption or otherwise, for the inherent good of children domiciled within its borders. We defined this doctrine in McIntosh v. Dill, 86 Okl. 1, 205 P. 917:

> "The doctrine of parens patriae to which we hereinafter make reference and application may be defined as the inherent power and authority of a Legislature of a state to provide protection of the person and property of persons non sui juris, such as minors, insane, and incompetent persons."

Ordinarily an adoption court devotes its entire attention as to whether the adoptive home will serve the best interests of the child and whether the child is properly placed in the adoptive home. Under this theory controversies respecting the termination of parental rights should be settled in other proceedings before adoption proceedings are brought as the issues to be tried in controversy over the termination of parental rights, i.e., the degree of unfitness of a parent, are quite different than the inquiry properly before an adoption court. See Commissioners Notes U.L.A., Uniform Adoption Act, Vol. 9, page 31.

Prior to the enactment of "The Children's Court Act" (Title 20 O.S. 1957 Supp. §§ 861-907) Oklahoma followed the theory above set forth. However, by enactment of "The Children's Court Act" in 1957, the Legislature specifically granted the Children's Court not only the power and authority to hear and determine adoption proceedings but also vested in said court the power and authority to determine custody of children.

Title 20 O.S. 1961 § 863, prescribed the jurisdiction of the Children's Court, the adopting court in the instant action, to-wit:

> "• • • the court shall have original jurisdiction in proceedings:
>
> • • • • • • • • •
>
> "4. To determine custody of the person only of any child living within the county.
>
> "5. For the adoption of a minor."

The Children's Court Order "Determining Children to be Eligible for Adoption Without Consent of Natural Father", contained, inter alia, the following:

> "That the Court has primary and original jurisdiction, within the purview of Title 20 OSA § 863, to determine for itself all questions of custody of minor children living within this State and County; that said minor children herein, Paul Delmar Davis and Gaylord Davis, have been domiciled in this County for approximately ten years; that the record evidence before this Court conclusively shows the natural father, Respondent, Thomas R. Davis, grossly neglected these minor children from a period of the summer of 1950 to this date by reason of absolute admitted failure to support them, by failure to visit them from 1950 to 1955 when he was divested of any further rights of visitation, since he had become a stranger to them; and

the evidence shows from expert testimony that it would be to the best interests and welfare of said minor children, physically, mentally and spiritually, to remain an integral part of the household of Applicants Ralph Neely and Virginia Gaylord Neely, and would be a physical, mental and spiritual detriment to them to be ordered to divide their time and allegiance to two homes, in one of which all of the occupants are strangers to them."

• • • • • • • • • • •

"That by the further reason of the record evidence which this Court has original jurisdiction to consider, concerning right of custody of these minor children domiciled within its jurisdiction, it is to the best interests and welfare of said minor children that the natural father Respondent, Thomas R. Davis, be divested of any rights of custody or visitation which might remain to him under the provisions of the California Divorce Court; and for that further reason these minor children are eligible for adoption by Applicant, Ralph Neely, in these proceedings without the consent of the natural father, Respondent herein, Thomas R. Davis.

"IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT, that children, Paul Delmar Davis and Gaylord Davis, are eligible for adoption in these proceedings without the consent of the natural father, Thomas R. Davis."

It is to be noted that the Children's Court not only found that the natural father grossly neglected the minor children but said court specifically divested the natural father of any rights of custody or visitation which might remain to him.

We fail to see any distinction between the exercise of such power by the Children's Court in instances where the

original decree of divorce, albeit one that granted visitation rights, was one entered by a sister state or one entered originally by an Oklahoma Court. The doctrine of parens patriae has long been recognized in custody cases, 4 A.L.R. 2d 41; and in view of the jurisdiction conferred by the Children's Court Act, it may be recognized with equal validity in adoption matters. Typical cases are collected at 47 A.L.R. 2d at page 848.

That such matters become a question of fact to be determined by the adoption court, when such jurisdiction has been so conferred as has here under our Children's Court Act, is recognized by the Supreme Court of Arizona in Shumway v. Farley, 68 Ariz. 159, 203 P.2d 507:

> "We hold that notwithstanding a divorce decree may award custody of a child to one parent, the other parent can be found to have wilfully deserted and neglected to provide proper care and maintenance for the child within the meaning of our adoption statute. The question of whether there has been such desertion and neglect of the child sought to be adopted is one of fact for the determination of the trial court."

We are not unmindful that the Children's Court Act was approved on May 17, 1957, and that the Uniform Adoption Act was approved ten days later. We discussed the interrelationship of these two Acts in Lewis v. Lewis, supra, and we see nothing in the circumstance that the Uniform Adoption Act was adopted more recently which erodes any of the jurisdiction of the Children's Court.

Title 10 O.S. 1961 § 60.6, provides:

> "A legitimate child cannot be adopted without the consent of its parents, if living, * * * except that consent is not necessary from a father * * * who has been judicially deprived of the custody of the child by any court of competent jurisdiction on account of cruelty or neglect."

Title 10 O.S. 1961 § 60.7, provides:

> "Where a parent has been * * * judicially deprived of the custody of a child on account of such cruelty or extreme cruelty or gross neglect of duty, or where a parent has wilfully failed, refused or neglected to contribute to the support of his child, as provided in the decree of divorce, for a period of one (1) year next preceeding the filing of a petition for adoption of such child, it shall not be necessary to procure the consent of such parent to the adoption of said child."

In our judgment it is not necessary to have a court of competent jurisdiction in a separate proceeding judicially deprive a parent of custody on account of extreme cruelty or gross neglect of duty or have a court judicially determine that the father has wilfully failed, refused or neglected to contribute to the support of his child as provided in the decree of divorce for the statutory period before a petition for adoption is filed. However, before entering a decree of adoption, it is necessary for the court to hear and determine why the consent of the natural parent is not necessary and in our opinion such may be determined by the adoption court which has the authority to determine the custody of any child living within the county and the power to issue a decree of adoption.

With respect to notice to the natural parent whose consent is believed to be unnecessary, Section 60.8 of the foregoing Title provides:

> "Said application shall be set for hearing on a day certain and notice of such application shall be given the parent whose consent is alleged to be unnecessary. The notice of the application shall contain the name of the child, or children, for whom application for adoption is made and the date said application is set for hearing and the reason that said child is eligible for adoption without the consent of such parent, and shall be served upon such parent as summons in civil cases

at least ten (10) days prior to the hearing. Provided, that if such parent resides outside the county, such notice shall be given by registered mail at least fifteen (15) days prior to the hearing."

In this cause notice was given the natural father by registered mail by the Clerk of the Children's Court on October 15th, 1959. The notice assigned as the reason consent to be unnecessary was that the natural mother had procured a divorce on the grounds of extreme cruelty. Thereafter, and after the natural father had entered his appearance and requested a continuance, the petitioner amended the adoption application by including as an additional ground the determination made by the District Court of Oklahoma County in the habeas corpus proceedings. The natural father responded to the amended application by a Motion to Dismiss. We are not unmindful that to this point in the proceedings all of the parties were looking solely to the effect of the divorce decree of the California Court and the habeas corpus judgment of the Oklahoma Court. However, at the opening of the proceedings, and at least two times during the hearings, the trial court indicated that its power to determine custody of minors was at issue and should be considered, and that the Children's Court would have the authority to determine that the children were eligible for adoption without the consent of the natural father "regardless of whether or not Mr. Davis has been heretofore judicially deprived of his rights."

The Children's Court not only found the natural father guilty of gross neglect but also judicially deprived him of all custody and visitation rights. This it had the statutory authority to do, and having exercised such authority it then had the power to determine the children eligible for adoption without his consent.

After the Children's Court issued its order determining that consent was not necessary, it proceeded with the hear-

ing on the Petition for Adoption. In considering the Petition for Adoption, the Children's Court ruled that the natural father could not participate in the proceedings and he contends this constitutes reversible error.

Title 10 O.S. 1961 § 60.16, prescribes the effect of a final decree of adoption upon the relationship of a natural parent and an adopted child. Until there is a final decree of adoption the relationship of parent and child still exists although the parent may not have the right of custody or the right of visitation and his consent to adoption might not be necessary. Although a natural parent's consent may not be necessary and a decree of adoption may be entered without his consent, he may still contest the propriety of the adoption and present to the adoption court evidence that may be relevant to the court's primary inquiry whether the adoption will promote the best interests of the child. We therefore hold that where an adoption court determines that consent of a natural parent is not necessary in an adoption proceeding, such parent may yet participate in the adoption proceedings.

Being entitled to participate in such proceedings, he can challenge the procedure of the adoption and the jurisdiction of the adoption court as well as the fitness of the petitioners. In the instant action we have already determined that the procedure followed by the Children's Court was correct and that it had jurisdiction to complete the adoption even though the natural father attempted to appeal from the order determining the children were eligible for adoption without his consent. Therefore, had the father been permitted to participate in the adoption proceedings, the only matter remaining for the adoption court to determine and for the father to challenge was whether the children should be adopted. The primary inquiry in making this determination was whether the adoption would promote the best interests of the children.

Therefore, denying the father the right to participate had the effect of denying the father the right to submit

evidence why the adoption should not be completed. However, when he was denied the right to participate the father made no offer of proof why the adoption would not promote the best interest of the children; why the adoption should not be completed; or in what manner he would participate if given the right to do so.

In Taylor v. Davis, 199 Okl. 260, 185 P. 2d 444, we held that as a general rule, the exclusion of evidence in the trial court will not be reviewed on appeal unless a proper offer of the excluded evidence is made and included in the record. Title 12 O.S. 1961 § 78, provides that the court, in every stage of the action, must disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party and no judgment shall be reversed or affected by reason of such error or defect.

Although the father was entitled to participate in the adoption proceedings, he failed to show in what manner he would have participated if permitted to do so and we can not find where the trial court's ruling denying him the right to participate affected the substantial rights of the father. We therefore conclude, that although it was error for the trial court to deny the father the right to participate in the adoption proceedings, such denial in the instant case does not constitute reversible error.

We have examined in detail the evidence upon which the trial court's determination as to its order determining the children were eligible for adoption without the consent of the natural father and its Decree of Adoption. Three medical doctors testified. One unequivocally recommended the adoption and the other two discussed what each believed to be the best interests of the minors. Both natural parents testified in length as did the Petitioner, Neely. This Court could witness their candor and demeanor and the trial court's findings are not against the clear weight of the evidence.

The judgment of the trial court determining the children eligible for adoption without the consent of the natural father and the Decree of Adoption are affirmed.

WELCH, DAVISON, JOHNSON and IRWIN, JJ., concur.

JACKSON, J., concurs in result.

BLACKBIRD, C. J., HALLEY, V. C. J., and WILLIAMS, J., dissent.

BERRY, J., having certified his disqualification in this case, Honorable GEORGE SHIRK, Oklahoma City, was appointed Special Justice in his stead.

HALLEY, Vice Chief Justice (dissenting).

The majority opinion states that the Children's Court found the natural father guilty of gross neglect and, based thereon, judicially deprived him of all custody and visitation rights. Then the opinion says "This it had the statutory authority to do, * * *." I believe this is wrong for two reasons. First, the Uniform Adoption Act does not provide for the adopting court to have the power as part of the adoption proceedings to make a determination judicially depriving a parent of custody of his child. 10 O.S. 1961 §§ 60.6, 60.7, specifically provide that such judicial determination *must have been made prior to the commencement of adoption proceedings.* 10 O.S. 1961 § 60.6 provides that consent to adoption is not necessary from a father "who *has been* judicially deprived of the custody of the child." And 10 O.S. 1961 § 60.7, provides that where a parent *"has been"* judicially deprived of custody his consent is unnecessary. This is also the construction placed on the Uniform Adoption Act by the National Conference of Commissioners on Uniform State Laws as shown by the Commissioners' Note found in Uniform Laws Annotated, Volume 9, p. 30:

> "Is is the theory of this act that the adoption proceedings should be based on consent. Only then can

the adoption court devote its entire attention to the inquiry whether the adoptive home will serve the best interests of the child and whether the child is properly placed in the adoptive home.

"Under this theory controversies respecting the termination of parental rights should be settled *in other proceedings* in a court with jurisdiction of the parties *before the adoption proceedings are brought.* Once the parental rights are terminated the adoption court in the adoption proceedings has no other function in this respect except to recognize that the parental rights *have been legally terminated* • • •.

"It has been suggested that a procedure should be provided in the adoption act to terminate parental rights where the consent cannot be obtained. Aside from the jurisdictional and procedural difficulties this would entail, it is subject to a basic policy objection. The issues to be tried in a controversy over the termination of parental rights, i.e., the degree of unfitness of a parent, are quite different than the inquiry properly before an adoption court. *The two should not be mixed.* The trial of controversial issues over parental rights should not cast an influence in the adoption proceedings where the sole inquiry should be the future best interests of the child.

"Consequently, the determination of the parental rights is left to be settled under the laws of the various states, and *until terminated,* by consent or by a court order in a court having jurisdiction of the parties under laws providing therefor, *there can be no adoption proceedings.*" (emphasis supplied.)

I believe that when our Legislature passed this Uniform Adoption Act they recognized, and understood the policy considerations stated in the above Commissioners' Note. The reasoning is valid. The adoption court should not be required to make a judicial determination concerning the

custody of a non-consenting parent. As I read our statutes the adoption court is not allowed to make that determination. Such judicial determination must have been made prior to the commencing of adoption proceedings. The adoption court will then decide whether there *has been* a judicial determination of custody rights.

The writers on the subject of our new adoption statutes apparently share my view. See Sater, Adoption of Children, 32 O.B.J. 2376; Adoption, 14 Okl. L.R. 353.

In the instant case, the latest judicial determination prior to the adoption proceedings concerning custody was that made by the California divorce court which granted Mr. Davis partial custody. If Mr. and Mrs. Neely thought there had been a change of conditions since the California determination, they could have tried the matter in the District Court of Oklahoma County which had continuing jurisdiction over the parties as a result of the habeas corpus proceedings begun in 1955. We said in Yahola v. Berryhill, 180 Okl. 637, 71 P. 2d 968, (a habeas corpus action involving custody of a child):

> "It will be noted, of course, that the trial court has continuing jurisdiction, and if a sufficient change in conditions in the future shall occur as to warrant a modification of the decree, it is within the power of the court to provide therefor."

Similar expressions are found in Black v. May, 152 Okl. 160, 4 P. 2d 17; Alford v. Thomas, Okl., 316 P. 2d 188.

Secondly. The majority opinion makes no effort to weigh the evidence presented by Mr. and Mrs. Neely to support their claim that Mr. Davis was guilty of gross neglect of his children as this Court must do on appeal when the issue is raised. The finding of the trial court is, in my view, clearly against the weight of the evidence. The father did not neglect the children. He was prevented from ever seeing or knowing them. After her divorce from Mr. Davis in 1950, Mrs. Neely took them from California to Oklahoma.

Mr. Davis corresponded with the children by letters and gifts until 1954 when he came to Oklahoma for the purpose of visiting them under the authority of the divorce decree granting his reasonable visitation privileges. Mr. and Mrs. Neely prevented him from seeing the children. In 1955, he commenced a habeas corpus proceeding to compel Mr. and Mrs. Neely to allow him to visit them. The application was denied. Thereafter letters and gifts sent to them were refused by reason of Mrs. Neely's objections to his further contact. Her attitude is revealed in the following excerpt from her testimony on cross-examination:

> "Q. Mrs. Neely, you would have to agree, would you not, that the failure of the natural father to see the children was due to your fixed objection; isn't that true?
>
> "A. I thought it was due to the writ of habeas corpus. I thought he wasn't supposed to see them.
>
> "Q. Mrs. Neely, who made it necessary to apply for a writ of habeas corpus?
>
> "A. I felt that it would hurt the children, and I was certainly for it.
>
> "Q. Then it has been your objection, hasn't it?
>
> "A. Oh, yes; and still is."

Going on to another point, the majority opinion says: "We therefore hold that where an adoption court determines that consent of a natural parent is not necessary in an adoption proceeding, such parent may yet participate in the adoption proceedings." Despite such holding, the majority opinion finds no error was committed by the trial court in denying Mr. Davis the right to so participate, because he made no offer of proof. The case of Taylor v. Davis, 199 Okl. 260, 185 P. 2d 444, cited by the majority opinion is authority only for the rule that a party who is properly allowed to participate in a trial cannot preserve for review an objection to the exclusion of evidence, unless a proper question is asked, and, on objection thereto, a proper offer of proof is made. Such a rule cannot be

stretched to fit the situation which the instant case discloses. The record shows that Mr. Davis was not advised that the hearing on the merits of the adoption would be had on the date it was held. Also the natural father should not be required to anticipate the evidence which would be presented by the Neelys and then make an offer of proof concerning what information he would elicit from their witnesses on cross-examination and what evidence he would present by his witnesses to rebut the testimony of their witneses. Merely stating such a requirement is sufficient to show its impracticality and infeasibility.

As the conclusion of the hearing on the application for order determining the children eligible for adoption without consent of the natural father the following colloquy took place between counsel for Mr. Davis and the trial judge:

> "The Court: The evidence on both sides having been concluded, the decision in said cause hereby being taken under advisement until May 27th at 10:00 o'clock a.m.; suggested findings of fact and conclusions of law to be presented as I have stated, and the Court will render its decision based upon findings of fact and conclusions of law as requested by counsel.
>
> "Mr. Luttrell: At that time, Your Honor, the decision rendered will be as to whether or not the children are eligible for adoption without the consent of Mr. Davis; is that correct?
>
> "The Court: That is all we have before the Court at this time.
>
> "Mr. Luttrell: I didn't want to face the proposition of going into a hearing on the merits of the adoption at that point without knowing about it."

Thereafter on the 27th day of May, 1960, the following occurred:

> "Mr. Luttrell: If the Court please, if the court should go ahead right now on the petition for adop-

tion it would become entirely an ex parte proceeding. The court would necessarily hold that the father has no right to be heard or to take part in such proceed. We specifically had an understanding when we left this courtroom before that the only thing we were coming back here for on May 27th was the question of eligibility of these children for adoption, and the transcript of testimony will so show, and if the court takes the view that we just don't have any more rights at all, that's one thing; but if the court thinks we have any rights, they would be violated by proceeding further at this time. * * *"

"The Court: * * * My feeling at this time is that the petition for adoption itself is part of the whole proceeding and should be disposed of at this time and that the entire matter should be appealed from at the same time; and I'm going to proceed with that, and I hope that the Supreme Court will help us in the future in determining what to do in this type of case. * * *"

"Miss Otter: If the Court please, we are ready to put on testimony if you desire. We have the Petitioners here on the question of adoption; however, as I have mentioned before, it is our feeling that the very testimony that would be applicable here is already of record. I would be happy to put Mr. and Mrs. Neely on if you would like for me to do so.

"Mr. Luttrell: Your Honor, may I ask for the record, is it now the ruling of the Court that the Respondent father has no further right to be heard at this time?

"The Court: Yes.

"Mr. Luttrell: Very well, sir, may we have an exception?

"The Court: Yes, show the exception."

Thereafter some evidence as to adoption was presented to the trial court and the following took place:

> "The Court: * * * It will be the order of the court that the final decree of adoption at this time will be entered, declaring that said children named herein shall from this day forward be known as Paul Neely and Gaylord Neely, lawfully adopted children of Ralph Neely. Are you going to make any record in regard to this?
>
> "Mr. Luttrell: As soon as the court is through, I would like to be heard.
>
> "The Court: All right, go ahead.
>
> "Mr. Luttrell: I would like if the court please, to state that Mr. Rice and I feel that we should also file a motion for new trial as to this last order, and we do not have it ready because we did not anticipate this step being taken this morning. * * *"

I am of the firm belief that the Law should be as a mantle about a man's shoulders to give protection for the most precious and personal rights he can possess: being a father of his own children and having them bear his name. The Court should not put itself into the position of giving lip-service to such a great principle by saying he has the right to participate in the trial of such a matter, then in the next breath destroy its effectiveness by denying his right to participate and at the same time require him to make an offer of proof when he had been given no warning or notice that there would even be such a hearing, let alone that he should make an offer of proof as to the many intangible and at that time unknown to him elements of testimony that could and should be presented upon a hearing of this nature.

In my judgment the majority opinion distorts both the facts and the law.

I dissent.

APPENDIX B

Filed in Supreme Court of Oklahoma, Dec. 17, 1963,

Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, December 17, 1963

NOTICE: EXTENSIONS OF TIME TO BRIEF WILL HENCEFORTH BE LIMITED

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

39402—Thomas R. Davis v. Ralph Neely and Virginia G. Neely,

39403—Rehearing and oral argument denied,

W. H. BLACKBIRD,
Chief Justice

APPENDIX C

Mandate of Supreme Court of Oklahoma

STATE OF OKLAHOMA } ss.
SUPREME COURT }

CHILDRENS COURT OKLAHOMA COUNTY NO. 292

MANDATE

Nos. 39402 and 39403

THOMAS R. DAVIS, *Plaintiff in Error,*

v.

RALPH NEELY and VIRGINIA G. NEELY, *Defendant in Error.*

THE SUPREME COURT OF OKLAHOMA:

To the Honorable Judge of the Children's Court Oklahoma County, in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 16 day of July, 1963 render an opinion in the above entitled cause, appealed from the Children's Court *Court* of Oklahoma County.

AFFIRMED

Now, Therefore, you are hereby commanded to cause such affirmance to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said opinion.

Witness, the Honorable W. H. Blackbird, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 27 day of Dec. 1963

(SEAL)

FILED IN THE CHILDREN'S COURT
OKLAHOMA COUNTY, OKLAHOMA

ANDY PAYNE, *Clerk*
By /s ETHEL C. HAMMETT
Ethel C. Hammett, *Deputy*.

Dec. 30, 1963

s/ LILLIAN WILSON
Clerk of the Children's Court

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